



Department of Law Monthly Report

Department of Law
Office of the Attorney General
State of Alaska

November and December 2002
Issue Date – February 24, 2003

Gregg D. Renkes
Attorney General

Scott J. Nordstrand
Deputy Attorney General – Civil Division

Patrick J. Gullufsen
Deputy Attorney General – Criminal Division

Commercial Section

DISCOUNT BUYERS' REALTY v. STATE OF ALASKA

In November 2002 Superior Court Judge Sharon Gleason granted the state's motion for summary judgment and dismissed this case. Judge Gleason also awarded the state \$10,000 in attorney's fees. The suit was filed by a real estate broker to challenge the constitutionality of an Alaska statute that prohibits a real estate licensee from splitting or rebating a portion of the fee obtained as a result of a real estate transaction with a person not licensed as a real estate agent. The plaintiff argued that the statute provisions violated rights to substantive due process, equal protection, and privacy. AAG Gayle Horetski represented the state in the case.

NICKI G. MARSH v. STATE

Nicki Marsh applied for a license to the Board of Barbers and Hairdressers for a license to practice permanent cosmetic coloring. Her application was denied by the board because she did not have enough prior experience in the trade to qualify for a license under new statutes controlling the licensing of practitioners of

In This Issue

COMMERCIAL SECTION	1
ENVIRONMENTAL SECTION	3
FAIR BUSINESS PRACTICES	3
GOVERNMENTAL AFFAIRS	6
HUMAN SERVICES	8
LEGISLATION/REGULATIONS	9
NATURAL RESOURCES	9
OIL, GAS, & MINING.	11
SPECIAL LITIGATION	12
TRANSPORTATION	13
CRIMINAL DIVISION	15
OSPA	24
PETITIONS & BRIEFS OF INTEREST	24
COURT DECISIONS OF NOTE – ALASKA	26

tattooing, permanent cosmetic coloring, and body piercing. On November 26, 2002, Marsh filed a lawsuit challenging the constitutionality of the state statutes and the regulations adopted by the board to implement new statutes. The suit alleges that the board's refusal to grant Marsh a license violated her rights to due process and equal protection and constituted an unconstitutional taking of her property rights. The suit seeks money damages, a temporary restraining order, and a permanent injunction prohibiting the state from enforcing the new license laws against Marsh. AAG Gayle Horetski represents the state in the case.

DOWNTOWN BICYCLE v. STATE

On December 2, Superior Court Judge Peter Michalski granted the state's motion to dismiss this action. The suit was filed by Peter Roberts, the sole owner of Downtown Bicycle Inc., against the State of Alaska, Commissioner of Revenue Wilson Condon, Attorney General Bruce Bothelo, and Larry Meyers, Deputy Director of the Tax Division. Mr. Meyers supervises the unit that regulates charitable gaming in Alaska. With the complaint, Mr. Roberts sought declaratory and injunction relief, as well as punitive and compensatory damages on the theory that the defendants failed to use the authority granted them under Alaska law to prevent a nonprofit corporation from using charitable gaming proceeds to fund a free bicycle program. The case was dismissed because Downtown Bicycle, a corporation, was not represented by an attorney as required by Alaska law. AAG Dan Branch represented the defendants in the case.

ACPE PREVAILS AGAINST TERMINATED EMPLOYEE

AAG Mary Ellen Beardsley successfully represented the Alaska Commission on Postsecondary Education in a superior court appeal brought by a terminated former employee. In September 2001, ACPE's

executive director terminated Dennis Watson as director of the division of student financial aid claiming he was still a probationary employee who could be terminated without cause. Watson appealed the decision to the commission and a three-member panel was established to consider his appeal. AAG Sarah Felix represented ACPE during this administrative process. After a two day hearing in November 2000, the hearing panel issued a decision upholding the termination. The panel concluded there were sufficient grounds to consider him a probationary employee and therefore, he could be terminated without cause. They also concluded that there was sufficient evidence to support a termination for cause as well. Watson then filed a separate action in the superior court claiming breach of contract and the covenant of good faith and fair dealing. AAG Beardsley took over the case at that point and filed a motion to have the case converted to an administrative appeal. Judge Weeks granted this motion. Oral argument occurred on December 17, 2002, and on December 20th, Judge Weeks issued an opinion upholding the commission's decision. He ruled that the commission has special expertise in determining whether someone is qualified to serve in upper management. He also ruled that the record supported Watson's termination for cause. A motion for attorney's fees is now pending.

RCA HAS HEAVY DOCKET

AAG Virginia Rusch has been busy assisting the Regulatory Commission of Alaska with an unusual number of court filings, regulations projects, and numerous orders the RCA is issuing to close old dockets and to comply with the first deadline for commission action under the new statute adopted in the legislature's special session last June. AAG Rusch has filed briefs for the RCA in response to two Petitions for Review of commission orders, and three requests for stays. Aurora Energy LLD petitioned for review of the commission order denying an interim increase after Aurora asked for an increase in the rates for electric power it

sells to Golden Valley Electric Association under a wholesale power contract. This case involves a first impression interpretation of AS 42.05.431(b). The superior court ordered the commission to hold a hearing and consider giving Aurora Energy an interim increase. Golden Valley has now moved for a stay of the superior court's order, which the commission has opposed.

In the Trans-Alaska Pipeline intra-state rate case, the commission ordered refunds of excessive rates paid by shippers in the years 1997 through 2000. The carriers have appealed and have filed a motion which argues that under AS 42.06.480(b), the commission may not enforce the refund order because they filed their appeal within 10 days. The commission argued that the carriers misinterpret the statute and the judge ruled in the commission's favor.

AAG Rusch has also been working with the RCA and legislation and regulations section on several regulations projects. Amendments to 3 AAC 52.900-940, which set terms for pole attachments between utilities, have now been filed with the lieutenant governor's office. Review is ongoing for amendments or new regulations that address the role of the Public Advocacy Section in RCA proceedings, and that adopt new filing requirements and other criteria for interstate interexchange carrier telephone competition.

Environmental

STATE CONTINUES AIR OPACITY PROGRAM FOR MARINE EMISSIONS

Following the assessment of numerous civil fines against cruise lines serving Juneau in 2000-2001, opacity violations in that port have declined by more than 80 percent. Several lines now use higher quality fuels and/or shore power when in port, and the state's observers

have recorded much lower emissions. For the 2002 cruise season, DEC collected a standard civil penalty of \$27,500 for a single violation by Holland America Line. No other cruise lines incurred penalties. In addition, the state and a Polar Tankers, Inc., agreed on a \$27,500 assessment against the steamship Polar Texas for a violation recorded in Valdez. \$17,500 of the Polar Texas penalty will be suspended on condition that the vessel uses low sulfur fuel oil in 2003, as it has promised to do, and achieves a violation-free year. AAG Sara Trent and AAG Chris Kennedy have handled the enforcement actions on behalf of DEC.

PENALTY COLLECTED IN PESTICIDE SUIT

Brew & Grow, Inc., a Minnesota purveyor of supplies for hydroponic cultivation, has paid a \$2000 cash civil fine for selling a misbranded pesticide by mail order to an Alaska address. The retailer has also agreed to a further \$2000 in suspended penalties, payable if it has any more pesticide violations in 2003. Brew & Grow ran afoul of Alaska pesticide regulations when it repackaged a pesticide that resembles chocolate milk into a plastic jug, deleting the required warnings and the manufacturer's child-proof packaging. AAG Chris Kennedy handled the case, part of the state's continuing enforcement program against illegal Internet pesticide traffic.

Fair Business Practices

OCCUPATIONAL LICENSING

ANCHORAGE OSTEOPATHIC PHYSICIAN REMAINS SUSPENDED

On November 12, 2002, the State Medical Board adopted the hearing officer's recommended decision in full and ordered that the medical license of Anchorage osteopathic physician should remain suspended pending the resolution of the ongoing disciplinary

proceeding against him. The State Medical Board summarily suspended the physician's license on August 28, 2002, because he posed a clear and immediate danger to public health and safety. AS 08.64.331(c).

An evidentiary hearing regarding the summary suspension commenced on September 4, 2002, and ended on October 14, 2002. In a 32-page decision, the hearing officer determined that physician posed a clear and immediate danger to public health and safety because he lacked good judgment and violated the medical standard of care in prescribing controlled substances to a variety of patients. Specifically, his conduct involved (a) inadequate histories and examinations of patients prior to prescribing medications; (b) excessive and inappropriate prescribing and administering of medication; and (c) inadequate follow-up on the efficacy of prescribed medications and inadequate monitoring of prescription use.

The physician filed a motion for reconsideration of the board's decision on November 29, 2002. No hearing date has been scheduled with regard to the accusation filed against the physician, which contains sixteen counts and encompasses fourteen patient investigations. AAGs Robert Auth and Roger Rom are representing the Division of Occupational Licensing in this matter.

REGULATORY COMMISSION OF ALASKA

ACS-GCI DISPUTE IN FEDERAL COURT

ACS v. RCA Commissioners is a federal court challenge to decisions made by the RCA in a dispute between GCI and ACS under the Telecommunications Act of 1996. In general, the Act requires local telephone companies to open their markets to competition, and provides mechanisms for competitors to access these previously closed markets. State commissions like the RCA have a comprehensive role under the federal Act. They implement competition by reviewing and

approving negotiated agreements reached between incumbents and competitors for compliance with the Act's requirements, or they can order and conduct arbitrations if the parties cannot voluntarily negotiate an agreement.

Under the Act, disputes concerning determinations made by state commissions are reviewed in federal court. The U.S. Supreme Court held last term that federal courts have federal question jurisdiction to review of such determinations for compliance with federal law, and that such review can occur under *ex parte* Young, by naming state officers in their official capacity.

The dispute in question concerns a determination made by the RCA to require ACS to arbitrate a second interconnection agreement with GCI to allow GCI to offer competitive services in the Glacier State service area. ACS is the incumbent local telephone company. GCI is seeking to compete with ACS in this service area. This service area comprises 12 rural communities in interior Alaska and the Kenai Peninsula.

ACS filed suit against the RCA commissioners in federal district court claiming the RCA commissioners have violated the 1996 Act by requiring it to participate in more than one interconnection agreement with the same competitor, for the same service area, during the term of an existing interconnection agreement. ACS also claims that the RCA commissioners have misinterpreted the existing interconnection agreement, which ACS claims also, by its terms, bars it from being required to enter into another agreement.

The RCA commissioners, through AAG DeVries, filed a motion to dismiss. The motion is based on two theories. First, ACS' contract interpretation claims are state law claims. And the Supreme Court has held that when a state officer is brought before the federal court under *ex parte* Young, the federal court has no jurisdiction to hear any state law claims because the Eleventh Amendment bars federal

court review of state law claims. Second, the RCA commissioners have argued that the single federal law claim ACS presented lacks merit, as it has no foundation in the Act's language, no court has ruled in favor of such a claim, and do so would run contrary to Congress' goal in adopting the Act, which is to promote competition. ACS' response is due December 18th. AAG Steve DeVries handled this case.

CHUGACH ELECTRIC ASSOCIATION RATE CASE

AAG DeVries represented the Public Advocacy Section (PAS) in a 3-week trial before the RCA beginning November 19. The case will determine the rates Chugach may charge its retail and wholesale customers for electric utility services. Other parties include Matanuska Electric Assn, and Homer Electric Association, both of whom are Chugach wholesale customers. Chugach is asking for approximately a six percent rate increase.

In this rate case, the PAS has argued that Chugach has improperly applied not yet approved depreciation rates in a manner which violates existing law, and results in an inflated depreciation expense for consumers. The PAS has also argued that Chugach has included improper plant additions and operating expenses in its rate calculation, which also impermissibly inflates Chugach's proposed rates. Finally the PAS argued that Chugach's previous rate structure resulted in Chugach's retail customers unfairly subsidizing Chugach's wholesale customers. The PAS has asked for this to be remedied.

Final argument is scheduled for December 13.

CONSUMER PROTECTION

STATE SETTLES WITH MUSIC CD MAKERS

The State of Alaska, along with 43 other states, reached an agreement to settle an antitrust price fixing case brought against

several music companies. The lawsuit alleged the music companies violated state and federal antitrust laws by requiring retailers to set minimum advertised prices ("MAP") for music compact discs. Failure to follow the MAP guidelines resulted in the loss of promotional funding to advertise the cd's.

The settlement contains two parts: a cash distribution component that allows affected consumers to file a claim for a partial refund, and a product distribution component, which will require the music companies to distribute millions of cd's to the states for further distribution to non-profit groups. Alaska will receive nearly 8,000 cd's which will be distributed to the state's library system. The total value of the settlement is about \$140 million. To find out more about the settlement, or to file a claim for refund, visit the settlement web page at www.musiccdsettlement.com. AAG Ed Sniffen handled this case.

STATE CLOSE TO SETTLEMENT ON TWO PRESCRIPTION DRUG CASES

Alaska and 39 other states reached an agreement on the financial terms of a settlement with Bristol-Myers Squibb ("BMS") to resolve claims surrounding two of its major drugs, Buspar and Taxol. Buspar, which is the trade name used for busparione hydrochloride, is an anti-anxiety drug, and taxol is a cancer drug. The plaintiff states alleged BMS violated state and federal antitrust laws by engaging in conduct that prevented or discouraged the entry of generic versions of these drugs into the market once the patents on the drugs expired. Generic competition would have reduced the price of the drugs significantly.

A final settlement will not be entered until other terms are negotiated, and Alaska's share of the \$155 million that will be paid to the states is unknown at this time. Alaska made claims in both cases on behalf of its consumers and its Medicaid agency. The total settlement, including payments to private plaintiffs, is over

\$500 million. AAG Ed Sniffen represents Alaska in this case.

STATE REACHES AGREEMENT WITH FORD ON SUV ISSUES

Alaska and all other states and territories reached an agreement with Ford Motor Company to resolve claims that Ford failed to adequately warn consumers about the dangers associated with operating SUV's. The investigation of Ford stemmed from the recall of Bridgestone/Firestone tires in 2000, the majority of which were used on Ford Explorers. The agreement requires Ford to pay over \$51 million for an aggressive public awareness advertisement campaign and to also pay \$300,000 to each of the states for use toward consumer protection, education, and enforcement. AAG Ed Sniffen handled this case.

STATE SETTLES WITH HOUSEHOLD FINANCE

The State of Alaska, along with 49 other states and the District of Columbia, has entered into a settlement agreement with Household Finance Corp. Under the settlement, which was filed in superior court, Household will change its lending practices and will pay the state \$75,000 to be used for consumer protection investigations and enforcement. The complaint filed by the state alleged that Household had violated state laws in a number of states by misrepresenting loan terms and failing to disclose material information to borrowers. The investigations conducted by the states focused on real estate secured loans. Although Household does not currently conduct real estate secured loan transactions in Alaska, the injunctive relief entered in the case ensures that Household will conform its lending practices to the standards required under the settlement should it enter into such transactions with Alaskan consumers in the future. AAG Julia Coster represented Alaska in this case.

Governmental Affairs

EDS BID PROTEST DISMISSED

Acting Commissioner of Administration, Sharon Barton, adopted the recommended decision of Hearing Officer Hemenway in dismissing a protest appeal filed by Electronic Data Systems Co. (EDS). EDS protested the notice of intent to award the new Medicaid Management Information System (MMIS) contract to First Health Services Corp. (First Health), under a negotiated procurement process. EDS alleged that it was error for the Department of Health and Social Services (DHSS) to have applied the Alaska bidder and offeror preferences to First Health's proposal. It was undisputed at all times that First Health qualified as an Alaska bidder, while EDS did not. EDS alternatively, claimed that DHSS could not apply any bidder preferences to the evaluation of proposals because the MMIS contract is a federally funded contract. Finally, EDS claims that the Alaska bidder and offeror preferences are unconstitutional. In dismissing the protest appeal, the hearing officer found that EDS's claims were untimely; that EDS failed to challenge the clear language of the RFP before proposals were due as required by AS 36.30.565 (the RFP specifically stated that the Alaska bidder and offeror preferences would apply in scoring proposals); and, DHSS could not have declared the preferences to be unconstitutional. Further, there was clear evidence that the federal agency overseeing the MMIS contract funds did not object, even after notice was provided by DHSS, to the state applying the Alaska bidder and offeror preferences to the procurement. EDS has filed for a stay of the contract award while it challenges the commissioner's decision and asks for a declaratory judgment as to the constitutionality of the Alaska bidders and offerors preferences.

ALASKA LABOR RELATIONS AGENCY DECISION AFFIRMED

The Public Safety Employees Association ("PSEA") charged that the state committed an unfair labor practice by conditioning an offer to settle an employee's contractual grievance on a release of the employee's statutory and tort claims in a related lawsuit. The Alaska Labor Relations Agency, relying on National Labor Relations Board precedent, concluded that this practice was not prohibited as an unfair labor practice. PSEA appealed. Judge Sharon Gleason affirmed the agency. Finding that the issue implicated the agency's special expertise, Judge Gleason applied the rational basis test and concluded that a rational basis supported the agency's decision. She noted the national board's reasoning that conditioning a settlement on release of other claims was a way to achieve the lawful goal of avoiding future litigation while observing the union's special status as the employee's exclusive representative under the employment agreement. Judge Gleason also addressed the mootness doctrine. The question was whether the appeal was moot because an arbitrator had considered and denied the grievance underlying the unfair labor practice charge. She concluded that the dispute had not lost its character as a live controversy because the union had argued that the grievance should never have been arbitrated. AAG Jan DeYoung handled this case.

ARBITRATION DECISION BARS WHISTLEBLOWER ACT CLAIM

Judge Sharon Gleason found that an arbitration decision barred a complaint under the Alaska Whistleblower Act, ruling in favor of the state in its motion for summary judgment. The employee had raised the whistleblower claim first in a grievance handled by her union. After a hearing the arbitrator granted part of the grievance but denied part of it, finding that the state had just cause to impose significant discipline but not to dismiss the employee.

The arbitrator ordered the employee reinstated but without pay for the period between the dismissal and the decision. The court found that the employee was bound by the arbitrator's decision, reasoning that a valid and final award in arbitration should have the same preclusive effect as a judgment of the court under the doctrine of res judicata and collateral estoppel, and dismissed the complaint with prejudice. AAG Jan DeYoung represented the state.

1998 CHALLENGE TO LINDAUER CANDIDACY IS MOOT IN 2002

The Alaska Supreme Court affirmed two superior court decisions in a memorandum opinion and judgment related to a challenge to the candidacy of John Lindauer based on alleged campaign disclosure violations. The court affirmed Judge Brian Shortell's early stay of the action to allow the Alaska Public Offices Commission to address the allegations first in an administrative complaint raising similar charges. It also affirmed Judge Stephanie Joannides' order dismissing the complaint under the mootness doctrine following the election of another candidate. AAG Jan DeYoung handled this case.

NO WAIVER OF SOVEREIGN IMMUNITY, THEREFORE PREJUDGMENT INTEREST NOT AVAILABLE IN ADMINISTRATIVE APPEALS

North Star Hospital sought prejudgment interest against the state on the amount of money that was awarded as the result of an administrative appeal of its Medicaid payment rate. The Alaska Supreme Court affirmed Judge Gleason's decision holding that administrative appeals are not encompassed with AS 09.50.250, and therefore prejudgment interest is not available under that statutory provision. The court found that *Danco Exploration v. State*, 924 P2d. 432 (Alaska 1996) controlled. North Star Hospital could not recover prejudgment interest against the state because Medicaid payment rate claims did not constitute a cognizable claim under AS 09.50.250. The

legislature has not waived sovereign immunity in payment rate challenges brought under the Administrative Procedures Act. AAG Julie Bryant handled this case.

WRONGFUL DISCHARGE SUIT RESOLVED

A former employee of the Department of Corrections accepted the state's offer of judgment in a wrongful-discharge suit. The state made its offer of judgment for \$10,000 after Judge William Morse ruled that a union's agreement to settle the former employee's grievances is binding on the former employee unless he proves that the union breached its duty of fair representation in handling or settling the grievances. After attempting to negotiate a settlement for a higher amount, the former employee accepted the state's offer of judgment rather than signing a settlement agreement and release. AAG Dave Jones represented the state in this case.

Human Services

STATE WINS TERMINATION OF PARENTAL RIGHTS APPEAL

AAG Brad Brinkman won an appeal before the Alaska Supreme Court in December 2002, relating to the termination of a mother's parental rights. In *S.B. v. State*, the mother challenged the termination of her parental rights claiming the superior court (1) lacked subject matter jurisdiction because a California court had appointed a guardian for the child, although the guardian was deceased at the time Alaska filed the CINA petition; (2) lacked personal jurisdiction because the mother was a California resident; (3) failed to appoint her new counsel even though her previous counsel stayed in the case as advisory counsel after she fired him claiming ineffective assistance of counsel; and (4) wrongfully denied her requests for continuances. The supreme court held; (1) the superior court had

subject matter jurisdiction under the UCCJEA because the guardian's death terminated the California guardianship so Alaska had initial child custody jurisdiction as the child's home state; (2) personal jurisdiction is not required for "status" determinations (i.e. terminating parental rights) under the UCCJEA; (3) the Superior Court did not error in refusing to appoint new counsel and allowing mother to proceed *pro se* with former counsel as advisory counsel; (4) that ineffective assistance of counsel claims must not only involve an attorney's lack of competence, but also prove that "the lack of competency contributed to the adverse result"; and (5) the trial court did not abuse its discretion in failing to grant continuances.

STATE MEDICAL BOARD SUSPENDS DOCTOR'S LICENSE

The Alaska State Medical Board suspended Anchorage ear, nose, and throat Doctor David Killebrew's medical license on December 20, 2002. The suspension is for six months; the board also imposed a \$6,000 fine, and placed Killebrew on probation for eight years.

Killebrew came to Alaska with a history of alcoholism and received his initial Alaska license in 1992 under probation and alcohol monitoring, and under a board order to permanently abstain from drinking alcohol. In 1999, staff at the Kodiak hospital, where Killebrew was holding a clinic, detected alcohol on his breath and a blood draw revealed alcohol in his system.

The Division of Occupational Licensing filed an accusation under the Administrative Procedure Act alleging violation of the medical board's previous order, and six other counts relating to unprofessional conduct and substandard care. The administrative trial occurred in May 2001, the Division of Occupational Licensing amended its accusation after the hearing, and an additional hearing occurred in December 2001, to try the additional counts. The hearing officer issued his proposed decision in

December 2002. At the administrative trial it came out that Killebrew had consumed close to a fifth of vodka into the early morning hours the night before in Anchorage, flew to Kodiak after several hours of sleep, and conducted his clinic which including performing an operation on a three-year-old boy. The case was prosecuted by AAG Ken Truitt.

Legislation/Regulations

MAJOR REGULATIONS PROJECTS COMPLETED

During November 2002, the Department of Law completed legal reviews of several major regulation projects. Almost all state departments had at least one major regulation project needing to be reviewed and finalized during the month. Thanks for the special efforts of all assistant attorneys general to meet these requests for legal reviews.

The sections also continued processing the draft language for legislation proposals suggested by state agencies for introduction in the 2003 legislative session.

REGULATIONS PROJECTS APPROVED FOR FILING

During December 2002, the Legislation and Regulations section approved several routine regulations projects for filing from professional and occupational boards and the Alaska Commission on Postsecondary Education. The section continued its review on larger regulations projects for the Board of Parole and the Department of Environmental Conservation for sanitation standards for child care centers.

The section also continued its preparation of draft legislation for the Office of the Governor's consideration for the 2003 legislative package.

DEPARTMENT OF LAW DONATES 1,129 POUNDS OF FOOD AND \$1,340 TO CHARITIES THIS HOLIDAY SEASON

Ho! Ho! Ho! The employees of the Department of Law in Juneau donated \$1,129 pounds of food to the local food bank. The local food bank reported much need for the food donations.

The Juneau employees also donated \$1,340 to the local Meals on Wheels program to provide hot lunches and companionship to needy seniors. The amount should provide a full year of lunches to a needy senior.

It is great during the holiday season to be able to benefit the community.

Thanks to Kevin Messing and Chris Blair for once again coordinating this important annual effort.

Natural Resources

RUSH v. STATE, DEPT. OF NATURAL RESOURCES

On November 26, 2002, AAG John Baker received a favorable decision from Superior Court Judge Sen Tan in *Rush v. State, Dept. of Natural Resources*, Case No. 3AN-01-10235 CI, an administrative appeal. The court upheld DNR's decision to offer for disposal a 10-acre parcel formerly containing the Big Lake Hatchery site. The court affirmed DNR's decision in all respects, holding (1) that DNR had a rational basis to determine that the current lessee of the site owned the on-site improvements; (2) that DNR properly applied the former version of AS 39.05.090, rather than the version amended in 1997, to set the price of improvements by appraisal, because the lessee's rights predated the statutory change and the legislature had not directed that the

statute be applied retroactively; (3) that Rush had waived any environmental claims by failing to raise them before DNR; (4) that DNR procedures requiring the high bidder to compensate the current lessee for the value of improvements do not violate equal protection, because the lessee is not similarly situated to any other party with respect to the State's disposal of the land; and (5) that DNR's public notice procedures complied with AS 38.05.945. It is not yet known whether Rush will appeal to the Alaska Supreme Court.

ALASKA SUPREME COURT AFFIRMS DISMISSAL OF CIVIL RIGHTS CLAIMS

The Alaska Supreme Court issued an opinion in *DeNardo v. Barrans* on November 29, 2002, which affirms the dismissal of Mr. DeNardo's civil rights claims against various state employees and officers. Mr. DeNardo had sued his supervisor and others under a wrongful termination for whistleblowing theory. He sued first in federal court, lost, and appealed unsuccessfully to the 9th Circuit. He then started over in state court. The Alaska Supreme Court concluded that the federal dismissal was res judicata as to his state claims.

AGGREGATE CONSTRUCTION, INC., SETTLEMENT

Aggregate Construction, Inc. operated an asphalt plant in Sitka at times during 1997, 1998, and 1999 without an Air Quality Operating Permit. Aggregate Construction, Inc., accepted an offer by the state to pay \$10,000. Of that amount, the state agreed to suspend \$5,000 conditioned on Aggregate Construction, Inc.'s full compliance with monitoring, record keeping, and reporting requirements. AAG Sara Trent represented the state in this matter.

CRUISE SHIP VIOLATION SETTLEMENT

Holland America, Inc., agreed to pay the state \$27,500 to settle a claim of violation of the

state's air opacity standards during the 2002 cruise ship season. The settlement represents a civil assessment of \$27,500 for an incident where Holland America exceeded state standards. The Department of Law and the Department of Environmental Conservation believe the opacity monitoring program encouraged industry to make technological and operational advancements which have resulted in vast improvements for the 2002 season. AAG Sara Trent represented the state in this case.

ARCTIC UTILITIES, INC.'S VIOLATIONS RESOLVED

Arctic Utilities agreed to pay the state \$130,000 in civil assessments to resolve past air quality violations at its facility in Deadhorse. Arctic will pay \$55,000 cash and \$75,000 will be suspended conditioned on the new owner, TDX North Slope Generating, Inc., installing new equipment. AAG Sara Trent represented the state in this matter.

SEAFOOD PROCESSING FACILITY SETTLEMENT REACHED

The state settled its claims resulting from permit violations from Trident's Seafood Processing Facility on Akutan Island in the Aleutian Islands. The \$1,000,000 settlement requires Trident to pay \$300,000 in cash, to pay \$300,000 in suspended penalties if Trident violates a term of the consent decree, and to perform a supplemental environmental project ("SEP"). Trident will be credited \$400,000 for the SEP, a \$1.5 million to \$1.7 million frame meat recovery project.

The frame meat recovery project includes the installation of a frame meat recovery line on Trident's seafood processing vessel, the Arctic Enterprise. The recovery line will reduce waste load and related amounts BOD on the watershed. If successful, this effort will benefit other processors. Trident is required to share the results of this project with the state and

other seafood processors. AAG Sara Trent represented the state in this case.

RED DOG CERT PETITION BRIEFED

On January 13, 2003, our D.C. counsel filed our reply brief in the petition for *certiorari* in the Red Dog Air Permitting case. That is the case in which ADEC and EPA disagree over which agency has the final word on what pollution control technology to require on a new generator at the Red Dog mine. A group of ten states also filed an amicus brief in support of the cert petition, as did two industry interest groups. According to our counsel, the U.S. Supreme Court will consider the petition on Feb. 21, and should issue their decision by Feb. 24, 2003. AAG Cam Leonard is the project manager in this case.

Oil, Gas & Mining

SETTLEMENT OF OIL AND GAS CORPORATE INCOME TAX DISPUTE

AAG Virginia Ragle assisted the Department of Revenue in settling a dispute with an oil and gas corporate income taxpayer. The audit years were 1997-1998, and the taxpayer had requested an informal conference. The taxpayer agreed to pay the state an additional \$2,400,000 in corporate income tax for those years.

ANOTHER TAX SETTLEMENT REACHED

The section has been assisting the Department of Revenue in another oil and gas corporate income tax dispute for tax years 1988 - 1998. After a lengthy informal conference process, DOR issued a detailed informal conference decision which the taxpayer appealed to the Office of Tax Appeals. A lengthy discovery period ensued, including the taking of nearly 50 depositions. In late November, the taxpayer agreed to pay

the state an additional \$9.5 million dollars to settle all issues. AAGs Mike Barnhill and Jan Levy were assigned to represent DOR, and were assisted by outside counsel John McCarron. Additionally, AAGs Tina Kobayashi, Phil Reeves, Virginia Ragle, and Lisa Kirsch participated in various aspects of this complex case.

NANA AND STATE SETTLE NANA'S NET PROFIT SHARE LEASE LIABILITIES

Following several months of negotiations, the Department of Natural Resources and NANA Regional Corporation reached a settlement of NANA's adjusted net profit share lease liabilities for the Duck Island Unit (Endicott) in November. NANA is one of several small percentage lease interest holders in the Duck Island net profit share leases. The adjustments result from application of the results of a DNR audit of the operating partner (British Petroleum) to NANA's ownership share. AAG Philip Reeves, in the Juneau Oil, Gas and Mining section, has worked with the DNR Oil and Gas Division throughout this settlement process, and will continue to work with the division in its application of the operator audit results to the four remaining non-operator lessees.

DEPARTMENT CLOSES GASOLINE PRICE INVESTIGATION

The Department of Law closed a three-year investigation into the pricing of petroleum products in Alaska after concluding that there was not sufficient evidence to support an antitrust action against one or more oil companies. The investigation was initiated in 1999 in response to public concerns about the cost of gasoline in Alaska in comparison to other states. The Oil, Gas and Mining section, state experts, and outside counsel examined hundreds of boxes of documents, and conducted depositions and interviews, to determine whether two or more companies entered into express or tacit agreements to fix petroleum prices. The investigation found that

Alaska's gasoline industry is highly concentrated and that four marketers accounted for the vast majority of gasoline sales. When there are few sellers, it is easy for them to observe how competitors react to decisions regarding output and prices. This type of behavior may lead to parallel pricing, which is not a violation of the antitrust laws in the absence of an express or implied agreement to set prices. AAG Jack Griffin was the lead DOL attorney in this case.

GLOBE CREEK MINE APPEAL

Globe Creek Mining and Fairbanks Exploration, Inc., administratively appealed a decision by the director of DNR's Division of Mining that a limestone deposit is not subject to acquisition under Alaska's mining laws for use as road paving aggregate in the Elliot Highway Project. After gathering additional information and holding a hearing, the commissioner issued a final decision denying acquisition of the deposit and Fairbanks Exploration, Inc., appealed to superior court. AAG Bonnie Harris represents the state in this matter.

REVISION OF REVENUE'S OIL AND GAS PROPERTY TAX REGULATIONS

The Anchorage Oil, Gas and Mining section worked extensively with Revenue over the past year to revise and update the Oil and Gas Exploration, Production and Pipeline Transportation Property Tax provisions in Title 15. The new regulations became effective January 1, 2003.

Special Litigation

TRANSPORTATION ON CLAIM IN WORKERS' COMPENSATION CASE DISMISSED

On December 12, 2002, the Alaska Workers' Compensation Board granted the State of Alaska's petition to dismiss a claim for transportation expenses where the employee, now a resident of Florida, claimed that the state was obligated to pay for all transportation and lodging costs, including first class airfare, to obtain medical treatment at the medical facility of his choice. In this instance the medical facility of the employee's choice was the Mayo Clinic in Rochester, Minnesota. AAG Patti Shake, representing the state as employer, argued that the state was only obligated to pay for transportation expenses to the nearest medical facility capable of treating the employee's condition. The state presented evidence that there were several medical facilities in Florida which could adequately evaluate and treat the employee's medical condition. The board agreed with the state's position that under Alaska's Workers' Compensation Act, employers are only obligated to pay for medical related transportation expenses to the nearest adequate medical facility capable of evaluating and treating the employee's work related injury.

PERSONNEL CHANGES

In December, AAG Gary Guarino resigned his position in the Anchorage Special Litigation section to assume the duties of an Assistant U.S. Attorney here in Anchorage. During his time with the department, AAG Guarino worked on most of the major litigation cases in the section. He will be sorely missed. We wish him the best in his new position.

DIFFERING SITE CONDITION CLAIM REJECTED

A contractor filed a contract claim against DOTPF seeking to recover impact costs arising out of a guardrail project in Petersburg, Alaska. The contractor argued that site conditions had been misrepresented, thus causing what should have been a two-week project to extend over two months. AAG Peter Putzier represented DOTPF at the contract claim hearing in July 2002, and submitted written closing argument as requested by hearing officer Susan Burke. On November 29, Commissioner Perkins adopted the hearing officer's recommended decision denying the vast majority of the contractor's claims, and letting stand most of the liquidated damages which had been assessed. The decision rejected the contractor's positions that the guardrail installation specifications provided a guaranty of soils conditions, that NCHRP 350 provided a representation of soils conditions, and that Section 606-3.02 or Section 203-3.02 of the specifications provided an affirmative representation of soils conditions. The hearing officer, and the commissioner, found that one of the primary reasons for the delay was simply that the contractor had chosen the wrong equipment to perform the installation work.

NEW TRANSPORTATION SECTION ATTORNEY

The Juneau Transportation section is very pleased to have Richard Monkman return to state service, after a dozen years in private practice. Dick has prior experience with the Department of Law as an Assistant Attorney General and supervising attorney. He has already fielded several difficult matters including a vessel collision in Ketchikan, and a hotly contested roofing dispute involving the Lemon Creek Correctional Center.

JUNEAU FOOT-BRIDGE CLAIM SETTLED

Swalling Construction filed a contract claim against the state alleging various financial and schedule impacts resulting from delays encountered during erection of a pedestrian foot-bridge across Juneau's Mendenhall River. Swalling's claim was for over \$1,200,000, and settled for just over \$300,000. The basis of Swalling's claim changed during the course of the claim, but the final, primary theory was that DOTPF erred in not making clear that the launch plan had to be approved before shop drawings would be approved. DOTPF's expert in the area of fabrication conceded that at least some time was owed. This fact, and the uncertainty surrounding several of Swalling's remaining claims, prompted DOTPF to settle the claim. AAG Peter Putzier handled this case.

VESSEL FUGITIVE BROUGHT TO JUSTICE

In what can only be described as an inter-and intra-departmental coup, the section worked with the Alaska Marine Highway System, the Juneau Police Department, the Alaska State Troopers, and the Juneau District Attorney's Office to apprehend a passenger aboard the M/V Malaspina. The passenger used a bad check to rent a stateroom and buy passage from Juneau to Bellingham for himself, for his companion, and for a 1992 Ford Taurus. It turned out that he had bought the car from a Juneau dealership using (another) bad check. Then, while onboard, he wrote seventeen more bad checks for food and a great deal of drink. The ferry system did not discover the problem until the Malaspina was just a few hours away from the Bellingham dock. Thanks to Juneau DA Rick Svobodny, a warrant was issued in record time, faxed to the Bellingham Police, and the party was over. The passenger is now in custody, awaiting extradition to Juneau to face an assortment of criminal charges.

FEDERAL COURT UPHOLDS AIRPORT FILL PROJECT

U.S. District Court Judge Singleton upheld the Army Corps of Engineers issuance of a permit to fill 218 acres of wetlands at the Ted Stevens Anchorage International Airport. The permit established a comprehensive process to regulate and mitigate fill in Postmark and Turnagain Bogs over a ten-year period. Trustees for Alaska, on behalf of Alaska Center for the Environment, Anchorage Waterways Council, and the Anchorage Audubon Society challenged the permit as violating the Clean Water Act, the National Environmental Policy Act, and the Clean Air Act. Judge Singleton denied plaintiffs' motion for summary judgment, granted cross-motions for summary judgment filed by the Corps and the State of Alaska, and dismissed plaintiffs' case. AAG Jim Cantor represented the state.

LAKE HOOD TIEDOWN DISPUTE RESOLVED

A floatplane slip permit holder appealed the state's termination of his permit under new airport regulations. The new regulations were enacted to more equitably administer the limited number of slips at Lake Hood in Anchorage. The permit holder failed to meet the minimum use requirements; moreover, a pilot, who was not properly registered to use the permit holder's leased plane and slip, was using them. The permit holder moved the court for permission to use the slip during the appeals process. The court denied this motion, applying the balancing of the hardships test. The decision was a harbinger of the final outcome. As a result, the parties achieved a settlement with court assistance. AAG Gary Gantz represented the state.

CONSTRUCTION CLAIM RESOLVED

This construction claim arose out of a design/build contract to retro-fit the heating systems of two National Guard armories, one

in Anchorage and the other in Wasilla. The contractor sought additional compensation totaling approximately \$160,000 for several allegedly unforeseeable changed site conditions. The Department of Military and Veterans Affairs and the contractor agreed to settle the claim for \$60,000. AAG Gary Gantz represented the Department of Military and Veterans Affairs.

AUTHORITY TO REGULATE RIGHT-OF-WAY UPHELD

A Soldotna business refused to apply for a permit to maintain a business parking area in a highway right of way. Superior Court Judge Christen ordered the business to comply with the state's encroachment permit regulations. AAG Jim Cantor represented the state.

CONSTRUCTION PROJECTS TRANSFERRED FROM INSOLVENT CONTRACTORS TO SURETIES

AAG Tom Dillon helped DOTPF negotiate the transfer of contract completion responsibilities from two insolvent contractors to their sureties. The companies held contracts with the state for at least 14 construction projects. Some of the contracts were nearly complete; others have significant amounts of work left to be completed.

NUGGET CONSTRUCTION CONTRACT CLAIM

On November 3, 2002, a magnitude 7.8 earthquake struck Interior Alaska causing severe damage to area roads and the Northway Airport. The Department of Transportation and Public Facilities (DOTPF) rapidly responded by mobilizing relevant contractors under its sole source procurement authority to address emergencies. AS 36.30.310 and 2 AAC 12.450.

One such contract was let to GNI as a prime contractor to repair the Northway Road and Airport. Another, smaller contractor, Nugget

Construction, already had an equipment rental contract with DOTPF that included this road and airport. Equipment rental contracts are for specific equipment with operators only, and are supervised directly by DOTPF personnel. Construction contracts with prime contractors include supervisory personnel of the contractor, materials, and in this case, additional equipment. Nugget filed a protest against the award of the emergency contract to GNI, contending that GNI's contract infringed on Nugget's contract and covered the same work. This claim potentially has far reaching implications because equipment rental contracts are commonly used by DOTPF. This office assisted DOTPF in addressing the Protest by Nugget, which was denied. Nugget is now pursuing an appeal to the acting commissioner.

Criminal Division

ANCHORAGE

In a case handled jointly the Anchorage DA's Office and the Office of Special Prosecutions and Appeals, Mark Edwards was sentenced for the first-degree murder of his ex-wife and her friend. After finding out that she had obtained a restraining order against him, Edwards went to her house and shot her and her friend before unsuccessfully committing suicide by turning the gun on himself. Judge Elaine Andrews sentenced Edwards to 48 years for each murder for a total of 96 years to serve.

Lengthy and complex pretrial litigation in the first-degree murder case against Joshua Wade took place throughout November and December. Jury selection began at the end of December. Wade is charged with raping and murdering Della Brown in August of 2000. Much of the pretrial litigation concerned the defense request to be allowed to introduce evidence at trial of specific and alternative

persons that could have committed the rape and murder.

In December, prosecutors at the Anchorage District Attorney's Office reviewed and found all of the actions taken by the Anchorage Police Officers to have been fully justified in connection with the officers shooting and killing Patrick Bailey after he pulled a gun on the officers when they attempted to arrest him in connection with an armed robbery Bailey had just committed.

A rash of recent killings have created an enormous homicide caseload in Anchorage.

Robert Dorr was charged in November with murder and sexual assault for raping and shooting his estranged wife. According to the complaint, after the sexual assault, Dorr followed her to a gas station where he shot her twice in the back and once in the head. Dorr then turned the gun on himself, shooting two times and sustaining a broken jaw and loss of hearing in one ear. A note addressed to police was found in Dorr's clothing stating that he was sorry for what happened, but that it was the only answer for him.

The U.S. Attorney's office has agreed to undertake prosecution of Miguel Orellana for killing a man in connection with a planned drug transaction rip-off that took place in the middle of the day at the J.C. Penny parking garage. State prosecutors concluded that the current status of the Alaska law of self-defense made state prosecution problematical.

A woman was charged in November with murder, manslaughter, three counts of assault in the third degree, felony DUI, and DWLS, as a result of her driving under the influence of cocaine and alcohol, and crashing a Chevrolet Suburban broadside into another vehicle after failing to stop for a stop sign. She previously had been convicted of 23 crimes, many of which were alcohol related, between 1994 and 2002.

Mark Rocereta was charged in November with murder for a shooting that occurred at a neighborhood bar in the presence of numerous patrons. Rocereta fled the scene and was stopped by police as he was driving to Homer. When asked why he had left Anchorage, Rocereta stated "to let this thing blow over for a couple of days." Police searched Rocereta's apartment pursuant to a warrant and recovered a manuscript containing stories about bar room shooting altercations.

A grand jury indictment was obtained in November charging Joshua Longley with murder for shooting his wife with a rifle. The murder took place in the family residence in the presence of his girlfriend and six-year old son. Longley told police he was in the process of getting a "peaceful" divorce and that the shooting was accidental.

Charles Collins was charged with murder and tampering with evidence in December for bludgeoning to death his girlfriend.

Keith Godfrey was charged with murder for shooting and killing one man and assault for shooting another man. The shootings resulted from an argument over a woman and took place in the parking lot of a hotel.

Prosecutors in the Anchorage District Attorney's office began working closely with Anchorage Police Department homicide detectives in the ongoing investigation into the shooting that took place in November at the Veterans of Foreign Wars Post 9978 that resulted in the death of Louis DeJesus.

Terral Wright was charged in November with over twenty charges including sexual assault, sexual assault of a minor, burglary, assault, and tampering with evidence for his conduct on more than one day involving multiple victims.

Brion Williams, a teacher at Heritage Christian School, was charged in November with

multiple counts of sexual abuse of a minor for having sexual relations with a student.

BARROW

Jerry Cogdill was convicted of bootlegging after a four-day jury trial. The person who purchased the alcohol from the defendant was the state's only eyewitness to the crime. The defendant had been offered a SIS with no jail time, but turned it down.

Monica Vasquez was granted a two-year SIS for bootlegging. The defendant had sold a bottle of vodka and a bottle of whiskey to a police informant. She was ordered to pay \$500 and complete 120 hours of work service as a condition of probation.

A Barrow grand jury indicted a woman for murder for the fatal stabbing of her boyfriend. The defendant had only been out of jail for a few weeks after serving a sentence for breaking the same boyfriend's windows and destroying his TV. The defendant stated she was angry with her boyfriend because he called her a floozy and laughed at her.

December was a very busy month for the Barrow office. After a six-day jury trial, Baxter Akootchook was convicted of two counts of assault, four on a police officer. The defendant had assaulted two officers by charging toward them when they answered a drunk removal call. The defendant claimed self-defense. A Barrow jury decided that they were unwilling to accept the level of violence displayed by the defendant. Along with numerous other penalties, the defendant was sentenced to a total of sixteen months with ten months suspended.

After an eleven-day jury trial, Arnold Ahgook was acquitted of attempted murder, but was convicted of four other felonies and a misdemeanor. The defendant had fired a rifle bullet into a parked patrol vehicle while two officers and another person were standing beside it. The defendant was deaf and had a

unique version of sign language that required the services of two interpreters at trial.

Forrest Neakok was sentenced to five years with three years suspended for assault three. The defendant was also fined \$2,500 and was placed on probation for five years.

Kevin Reilly was sentenced to five years with three years suspended for assault three. The defendant was also fined \$5,000 and was placed on probation for five years.

Donald Allmond was sentenced to three years for his fifth DUI.

After a highly contested adjudication and disposition hearing, Charles Aniskett had 330 days of misdemeanor probation revoked for drinking Lysol on the day he was released from a thirty-day jail sentence for reckless endangerment. In the underlying case, the defendant had attempted to take over the controls of a small plane from the pilot.

BETHEL

There were several jury trials in Bethel in November and December, with mixed results.

Henry Yako was found guilty of two counts of sexual assault in the third degree after a jury trial. After the return of the verdict, Yako was arrested on the charge of violating conditions of release for consuming alcohol.

Edwin Soto was found not guilty of sexual assault in the second degree, but guilty of assault in the fourth degree. Samuel Hare was found not guilty of felony DUI and refusal. And Dietrick Mael was found not guilty of sexual assault in the second degree, sexual abuse of a minor in the second degree, and two counts of furnishing alcohol to a minor after a jury trial.

In misdemeanor cases, a man was found guilty of assault in the fourth degree on a police officer, and another was convicted of

drunk driving after 20 minutes of jury deliberation. A man was found not guilty of assault in the fourth degree and harassment, and another was acquitted of driving while intoxicated.

In the grand jury, six people were indicted for burglary or theft, five people were indicted for bootlegging, five people for drug offenses, and one person with tampering with a witness. In violent crimes, two people were indicted for kidnapping and related offenses, three people for sexual assault or attempted sexual assault, and three for felony assault.

DILLINGHAM

A jury acquitted Bertinous Foss of second degree murder following a week and a half trial in November. Foss and an acquaintance had gotten into an altercation inside Foss' residence. Foss left the room to obtain a firearm, and shot the victim to death upon returning to the room. The jury acquitted Foss due to the state being unable to disprove self-defense beyond a reasonable doubt as required under the current Alaska law of self-defense.

John Knutsen was sentenced to four months in jail for felony indecent viewing after a two-week jury trial. Knutsen was a lifeguard at the community pool in Naknek. He planted a miniature camera, concealed in a smoke detector, in the women's changing room. Knutsen thereby was able to videotape a swim session frequented by the children of the community.

In November Jesse Lockuk was charged with murder for beating a man to death with his hands and feet. Lockuk claimed to have "stomped" the man for "disrespecting" Lockuk's mother. There were three other cases of felony sexual offenses, including one defendant who was on probation in connection with a previous sexual assault conviction.

In December, indictments were secured from the grand jury in four new sexual assault cases, one of which included a charge of incest. A man was also charged with burglary and assault for breaking into his ex-girlfriend's home only one week after being released from jail and while on probation for felony driving while intoxicated and misdemeanor assault against a police officer.

Dillingham ADA John Skidmore transferred to the Anchorage DA's office, and was replaced by ADA John Wolfe, who transferred from Kenai. We are grateful to John Skidmore providing such good service to Dillingham for the last few years, and to John Wolfe for providing the continuity needed by the office.

FAIRBANKS

The Fairbanks office welcomed a new sexual assault prosecutor, Jenel Domke, who comes to us from South Carolina, where these crimes carry the death penalty.

Fairbanks continues to have a marked increase in aggravated assault cases of all types, with Fairbanks Police Department alone documenting a 25 percent increase to date this year.

A few sentencings of note: Adam Williams was sentenced to 99 years with 24 suspended for the murder of his wife one day after their divorce. He stabbed her 57 times, but claimed traumatic amnesia of the events.

Durwanze Cooper received six years to serve for jamming his fingers down the throat of his girlfriend's infant daughter, plus another two years revoked consecutively on a prior felony. When he's done in Alaska, the State of Florida has similar charges waiting for him.

Manus McKeegan received a composite sentence of 10 years with four suspended for felony assault and violating a DVRO for an aggravated attack on his estranged wife.

Judge Savell agreed it was most serious, finding it approached an attempted murder.

Larry Wholecheese received three years to serve for events surrounding a day-long armed standoff in Galena at the time of his arrest for sexual abuse of a minor. He was acquitted at trial of the SAM charges, but convicted of escape and felony assault on the officers. A week after the verdict, someone in Galena burned his hunting camp to the ground, a crime that remains unsolved at this time.

December seemed to be domestic violence month, with a significant number of misdemeanor and felony cases going to grand jury and trial, including one case in which the defendant violated his parole in Anchorage and traveled to Fairbanks to assault and kidnap the former girlfriend who was trying to hide from him. The good news is that the law enforcement training in documenting strangulation injuries and ER 404(b) history has greatly improved our ability to prosecute these cases.

ADA Gene Gustafson obtained a conviction in the Lee Brown bank robbery case. In spite of a defense expert on the limitations of eyewitness testimony and three alibi witnesses for the defense, the jury could not accept the defendant's explanation for possession of, among other things, over thirty \$2 bills taken from the teller. Brown was also convicted of DUI, which was the basis for police contact several days after the robbery.

ADA Gustafson was able to organize a multi-disciplinary team to take advantage of free training involving computer-facilitated crimes against children. Their application has been accepted for the week-long training in February.

ADA Jeff O'Bryant assisted Fairbanks police in securing over a dozen search warrants to facilitate an investigation of gambling at a half dozen local bars. Charges are pending review.

A post-Christmas arson/homicide and a separate attempted murder dovetailed into a three-state investigation, which involved an arson in Washington and the murder of two others in California, all connected to the Fairbanks cases. Twenty-two year old Jason Wallace is charged with the Fairbanks murder and conspiracy in connection with at least three other planned killings.

JUNEAU

The Juneau grand jury returned an indictment charging Department of Education and Early Development employee Gary Martin with stealing over \$150,000 from the State of Alaska. He has been charged with two counts of theft in the first degree, two counts of a scheme to defraud, two counts of tampering with public records in the first degree, two counts of official misconduct, and fourteen counts of forgery in the second degree. All of the offenses, with the exception of official misconduct, are felonies.

Martin, who worked as a procurement manager for the State Library, is charged with presenting the Department of Education with false bills for services rendered from two non-existent companies, for work never done. In his position as procurement manager, Martin allegedly created false documentation for the work and then had state checks issued to the companies, which he cashed. It is estimated that by the time the investigation is complete, the loss will total over a quarter of a million dollars.

Martin is also charged, in a pending case, with possessing automatic weapons and obtaining drugs by deception. Martin is on probation in a previous case where he was convicted of attempted misconduct involving a controlled substance in the fourth degree.

Dick Blue Sky and his wife Cynthia Sky were sentenced, after being convicted of multiple offenses of taking young girls to a remote island and having sex with them. Dick Sky

received a sentence of 75 years with 20 years suspended and Cynthia Sky received a sentence of 36 years with 10 years suspended. Dick Sky had previously been convicted of sexually abusing his own child in 1982. Cynthia Sky had been convicted of selling cocaine in 1992, but her conviction was set aside after completing a suspended imposition of sentence.

A Hoonah man was charged with driving while intoxicated and manslaughter after striking and killing a pedestrian.

Joshua Stephenson, who is on felony probation for robbing a person and throwing him off of the cruise ship dock, has had a little difficulty on probation. He was indicted for felony driving while intoxicated.

Ryan Hendrickson, a felony probationer from Kenai, was indicted for sexually assaulting a woman at a halfway house.

KENAI

Chris Ballard was convicted of felony DUI following a jury trial in Seward. Ballard and his wife had been riding four wheelers when he rolled his vehicle down a ten foot dike. This was observed by several people some distance away, one of whom called the police and then went to confront Ballard who had grabbed ahold of his wife and started shaking her aggressively. When the officers arrived they observed indications of intoxication on both Ballard and his wife, and both were charged with DUI. Mrs. Ballard plead out to her DUI, but testified at her husband's trial that neither she nor her husband had consumed any alcohol while, or prior to, driving, but only while waiting for help to arrive.

Kenneth Roberts Sr., was convicted of tampering with witnesses, coercion, and interference with official proceedings following a jury trial in Kenai. The defendant had confronted the brother of the victim of an assault by the defendant's son, and told the

KETCHIKAN

brother to tell the victim that if he showed up in the court to testify, the defendant would kill both the victim and his brother.

After a court trial, Chris Ballard was found guilty of felony failure to appear. The trial judge did not accept his defense that he had to meet repeatedly with his civil attorney in an unrelated lawsuit, and therefore was unable to attend to his felony matters.

The "slept-it-off" defense was used in a DUI trial when the defendant claimed he drank at home, went to bed, and went soundly to sleep thereby sleeping off the effects of alcohol. Of course, the fact that she woke up still intoxicated was of little concern to her as she went driving off at three in the morning in a vehicle with no headlights and, according to her testimony, turned down the wrong street because she got lost. As was pointed out to the jury, this street was less than half a mile from the house where she, as she testified, had lived for thirty years. The jury didn't buy her story.

In the final jury trial of the year, David Golab was convicted of minor consuming in a matter of minutes. The jury did not buy his defense that he was a neophyte with alcohol and had no idea the 8 to 10 cups of his "favorite dessert", Jell-O, had alcohol in it. Wearing his Air Force uniform as he testified, he claimed to have eaten the Jell-O at three o'clock in the afternoon, but did not feel the effects until seven o'clock that night. His final argument was that he should be acquitted because the state did not prove that it was his puddle of vomit he was found lying in.

The "chaperone"/disk-jockey of the local Homer teen center was indicted on ten counts for illegal conduct with minors including giving a controlled substance to minors, sexual assault of a minor, and giving alcohol to minors. As a result of this case, the teen center was temporarily closed, and a new supervisory staff is being put in place.

Belinda Nelson was convicted by a jury in Ketchikan for hindering prosecution in the first degree. She was hiding her boyfriend at her apartment knowing that a warrant was out for his arrest. When the police got a search warrant and searched her apartment, they had a easy time finding him. He was hiding under her mattress which stuck up in the air.

A Wrangell trial ended in a hung jury on perjury charges against Alijah Cowan. A Ketchikan man was convicted by a jury of interfering with report of DV crime but found not guilty of assault in the fourth degree for assaulting his wife. A man was convicted by a jury in Craig for interfering in arrest. He jumped on the back of a police officer who was arresting a girl friend in a bar.

In November, a Wrangell man was indicted for felony theft. A Ketchikan man was indicted for assault in the second degree for strangling his wife. Several persons were indicted for misconduct involving possession of controlled substances in the third and fourth degree. Two other men were indicted for assault in the third degree. Two others were indicted for failure to stop and felony DUI.

In December, six persons were indicted for misconduct involving possession of controlled substances in the third or fourth degree. A Ketchikan man was indicted for failure to stop at the direction of a police officer after reaching speeds of 100 mph and running several cars off the road. The police officer had tried to stop the car for an equipment violation. A Ketchikan man was indicted for sexual abuse of minor in the second degree. Another Ketchikan man was indicted for assault in the third degree for threatening the victim with a knife. Others were indicted for criminal mischief in the third degree and for felony DUI.

KODIAK

Within 24 hours of posting \$1,000 for his release in a pending DUI, a 26-year-old Kodiak man thought he would try his hand at driving while intoxicated again and ended up getting a felony eluding charge as well. This defendant pled to felony eluding, driving while intoxicated, and driving with a suspended license and was sentenced to a composite 850 days to serve in jail with another 360 days suspended. He was also placed on probation for five years.

The final co-defendant of three was sentenced for the slashing of an off-duty Kodiak police officer in June of 2001. Originally charged with attempted murder, this defendant eventually pled to assault in the second degree, tampering with physical evidence, and being a felon in possession of a concealable firearm. The defendant stipulated to a "most serious" aggravator on the assault charge and was given a 10-year flat time sentence to serve. On each of the other two charges he was sentenced to three years of suspended time on each count, consecutive to each other and consecutive to the assault time. This defendant was additionally sentenced to 12 months in each of two probation revocation cases, with time to run concurrent with each other but consecutive to all else. All that boils down to a composite sentence of 17 years with six years suspended. In addition he was placed on probation for the maximum term of 10 years. The injured officer has completely recovered.

A 25-year-old Kodiak resident was sentenced to 48 months in jail with 42 months suspended, and placed on probation for five years, following his conviction for felony drugs. This man had distributed small amounts of crystal methamphetamine in July of this year. INS has already placed a detainer on this man as well, and after he serves his time in custody he is all but certain to be deported to the Philippines.

A 19-year-old Kodiak man was indicted for sexual assault in the first degree upon allegations stemming out of a weekend alcohol party in March of 2002. The allegations of sexual assault did not reach police until November when this defendant was being investigated for another sexual assault. The underage victim had not come forward with her allegations at the time because she was afraid she would herself get in trouble for being a minor consuming alcohol. A March trial date is pending.

A 34-year-old Anchorage man with family ties to Kodiak was sentenced to three years with two years suspended, and fined \$5,000 with \$4,000 suspended, after his conviction for misconduct involving a controlled substance in the fourth degree. This defendant, who had no prior criminal history, was also placed on supervised probation for the five year period following his release from incarceration. This same Anchorage defendant was also convicted of giving false information to a Kodiak police officer in an unrelated case.

KOTZEBUE

A Buckland man was arrested by the Alaska State Troopers for sexual abuse of a minor in the second degree for having sex with a 15-year-old girl. AST began their investigation after receiving information from school administrators who had suspicions about the defendant and victim's relationship. A Selawik man was arrested by AST for sexual abuse of a minor in the third degree in Selawik. The 13-year-old victim reported that her uncle fondled her while she was sleeping. A Kotzebue man was arrested for sexual abuse and sexual assault charges for sexually abusing his four-year-old granddaughter.

A Kotzebue woman was charged with filing a false report that a Kotzebue man had raped her. The man was arrested shortly after and put in jail. The next day she went to the police and told them she had made up the report because she was mad at her boyfriend.

Another Kotzebue woman was arrested and charged with seven charges including forgery, scheming to defraud, criminal impersonation, and fraudulent use of an access device. She is accused of assuming another person's identity and applying for and using credit cards in the other person's name and charging over \$20,000 in goods.

A Kotzebue man was sentenced to 360 days for assault in the fourth degree. He had been charged with assaulting his niece and was found to be a worst offender.

Two young men from Noorvik were arrested by Alaska State Troopers for sexual assault and assault in the fourth degree. Both are accused of sexually assaulting a woman on the streets of Noorvik and then punching her in the face when she fought back. They were later indicted on these charges by the grand jury.

A Kotzebue woman was arrested on burglary and theft charges, for entering a house and taking a handgun with a scope. Police located the handgun soon after.

NOME

Two Unalakleet men have been charged with sexual abuse of a minor in unrelated cases. Two remarkably similar, but unrelated, drug interdictions took place in Unalakleet. In both cases, the suspect was travelling through Unalakleet to the village of Stebbins. Both consented to a search, apparently believing that the trooper would not discover the quarter pound of marijuana hidden in the suspect's crotch area. In an alcohol interdiction case, two people were stopped at the Nome airport in their effort to take two cases of whiskey to the dry village of St. Michael. The 24 bottles were hidden inside a bucket of laundry detergent and a bag of dry dogfood.

A Stebbins man was charged with a variety of felonies after pointing a gun at his girlfriend, sticking her with a knife, and having non-consensual sex with her. Another Stebbins

man was indicted on a felony assault charge after manually strangling his wife during a domestic assault.

Assistant DA John Earthman tried an entertaining DUI case. John is from Texas, the defense attorney is from Kentucky, and the defendant, Larry Carter, is from Georgia. All have accents appropriate to their origins. John described the trial as sounding like a bad episode of "Hee-Haw". Mr. Carter, despite being a "good 'ole boy", was found guilty by a Nome jury.

Benjamin Eakon, Jr., of Unalakleet was arrested on a felony DUI just prior to Christmas. Within a week he had been indicted, plead guilty, was sentenced, and his snowmachine forfeited. Our objective, of course, is to make all cases move this efficiently.

The Nome Police investigated two sexual assault cases occurring the same night. A man was charged with Nome's version of a "date rape"; sexually assaulting a woman he had met in a bar and invited home for more drinks. Another man was charged with a more unusual sexual assault. The police had responded to a disconnected 911 call and actually observed and interrupted the defendant engaged in a forcible sex act with the victim. The victim is now recanting her original statements, but the tapes of the officer's arrival at the residence and of the initial interview are quite compelling.

Car theft is a relatively uncommon offense in Nome, but the Nome police managed to make two unrelated vehicle theft arrests in one night.

The "imaginative charging" award for the month goes to the Unalakleet Police Department which charged a man with felony criminal mischief after he let the air out of a tire on Unalakleet's only police vehicle. The theory of the complaint was that the defendant's actions caused an interruption in police services to Unalakleet for the half hour it took to get the tire pumped back up. (The defendant eventually plead to a misdemeanor).

PALMER

Travis McNair was convicted following a bench trial of taking a sub-legal Dall ram. The only issue in the trial was how to measure the curl of a Dall sheep horn. McNair repeatedly attempted to demonstrate to the court how the sheep appeared to be a full-curl from a low angle. The state presented extensive expert testimony, which convinced the court.

William Clary, Brian Lizer, and Travis Lizer entered pleas to felony charges for using vigilante justice to find the person they suspected of stealing their marijuana crop. The defendants broke into the residence of a friend of the suspected marijuana thief and assaulted him with a bat, pistol, tire iron, and wire around his neck. Despite severely beating the victim, they never found out where the person they sought was, because the victim had not associated with the individual for over a month. All three were apprehended by the troopers that evening. Robbery charges are pending against the persons suspected of the theft of the marijuana crop.

Lorayne Johnson was indicted on charges of attempted murder, assault in the second degree, assault in the third degree, felony DUI, and felony refusal to submit to a breath test. Johnson and another man drove to the victim's house during the early morning hours, and entered his shop without permission. After the victim confronted them, Johnson drove a Ford Bronco into the shop, running over the victim and smashing into a wall. The victim sustained multiple injuries, which required extensive medical attention.

Stephen Mason was sentenced to serve ten years on sexual abuse of a minor charges. Mason was convicted in September for sexually abusing his daughter over a period of nine years. James McNulty pled to a consolidated charge of robbery in the first degree, with an agreement to serve ten years in prison. McNulty, along with his younger

brother and a juvenile, committed a number of crimes a year ago, including a robbery of a convenience store, a carjacking, and a drive-by shooting. Fortunately, none of the victims were injured. Jason Geisler pled guilty to first degree robbery for a carjacking in Wasilla.

Seventeen-year-old Ricky Shivers was convicted, after a jury trial, of first degree and second degree assault for beating his "best friend" because the friend had a relationship with Shivers' girlfriend. The victim suffered multiple fractures to the face and has a permanent brain injury. Shivers' attorney argued that the jury should only convict him of assault in the second degree, which would result in him being sentenced as a juvenile instead of an adult.

Sherrie Fragnoli was indicted on charges of theft in the second degree and falsifying business records. She is accused of embezzling approximately \$13,000 in 2001 during her employment with One Stop Travel in Wasilla.

This month's award for honesty goes to Joshua Waisanen, who was convicted of minor consuming alcohol after a bench trial. Waisanen told Judge Lombardi that he had been coming to court to observe, and it was his opinion that defendants lied when they said they were sorry and regretted their actions. He told the judge he was not sorry and did not regret his actions.

SITKA

The big Sitka case for the month of November was the trial of Paul Johnson, a teacher at Mt. Edgecumbe High. Four days before graduation last year, Johnson had two senior girls over to his apartment for tacos and a movie. The movie the girls wanted to watch is titled Wild Things. Mr. Johnson owned the movie and had discussed it previously with the girls. Mr. Johnson referred to the girls as "Wild Things". The film contains a scene where a high school teacher and two female students have sexual

activity, which is what happened after the movie was over. He admitted to the police that there had been sexual activity, but claimed it was consensual (perhaps not realizing that consent is not in sexual abuse cases). At trial Johnson testified that he did not allow the girls to watch the whole movie, in other words the "bad" scenes were skipped. He also testified that the police detective had "coerced" him into a confession. The jury listened to the taped confession. It sounded like friends talking, not like he was being strong-armed. The jury deadlocked and the case is set to go to trial again next month.

OSPA

(Office of Special Prosecutions & Appeals)

Personnel News

Jim Hanley ended his two-month tour with OSPA after having come out of retirement to temporarily fill a vacancy created by Ros Lockwood moving out-of-state. On a high note, in *Riley v. State*, Op. No. 1847 (Alaska App., December 27, 2002), the court of appeals adopted Jim's argument that it should overrule its anomalous reading of the accomplice-liability statute in *Echols v. State*, 818 P.2d 691 (Alaska App. 1991). This capped Jim's other published victories in *Cathey v. State*, Op. No. 1845 (Alaska App., December 13, 2002), and *Beaudoin v. State*, 57 P.3d 703 (Alaska App. 2002).

Prosecution News

The trial of pipeline shooter Daniel Lewis was successfully concluded by AAG Kevin Burke. Lewis shot a hole through the pipeline, spilling over 285,000 gallons of oil, pointed the gun at his brother, Randy, and drove his four-wheeler while intoxicated. At trial, Lewis's defense attorneys attempted to blame Randy, but the jury still convicted Daniel of first-degree criminal mischief (damaging the pipeline), oil

pollution, third-degree assault, and DUI. Lewis's sentencing is set in May.

The statewide Fish & Game prosecutor, Jack Schmidt, concluded the majority of the remaining cases that were generated by people who were fishing in closed waters this summer. Seven defendants were convicted and fined for a total of \$15,000.

Ruth Carmona and Shannon Conley were convicted and sentenced for welfare fraud for receiving more money than they were entitled to. They both failed to report all of their income to the Division of Public Assistance. Conley was sentenced to pay full restitution and do community work service while Carmona was sentenced to six months in jail in addition to restitution. Julia Fine, who was on probation for welfare fraud, had 15 months of incarceration imposed for violating her probation conditions.

Petitions & Briefs of Interest

Petitions of Interest

DUI – elements of blood-alcohol-level under AS 28.35.030(a)(2). In *Conrad v. State*, 54 P.3d 313 (Alaska App. 2002), the court of appeals held that the legislature did not intend the chemical test to determine whether or not a driver had driven with an over-limit blood-alcohol level. Instead, the test was presumptive of the driver's blood-alcohol level at the time of driving. The state asks the Alaska Supreme Court to reverse the court of appeals and to interpret AS 28.35.030(a)(2) as providing that a driver's blood-alcohol level at the time of testing determines whether he has committed the offense. *State v. Conrad*, S-10935.

Briefs of Interest

Definition of coercion. The defendant was convicted of coercion for instilling fear in the victim that he would assault her if she tried to leave her cabin, ultimately causing her to remain inside for three days. The state argues that the defendant need not have conveyed his threat by a written or oral communication, but that his conduct alone was sufficient to sustain the conviction of coercion. *Otten v. State*, A-8201.

Constitutionality of Evidence Rule 404(b)(4). The state argues that Evidence Rule 404(b)(4), which allows the admission of prior acts of domestic violence in a domestic violence prosecution, does not violate due process and that the court of appeals should not overturn. *Fuzzard v. State*, 13 P.3d 1163 (Alaska App. 2001); *McGill v. State*, 18 P.3d 77 (Alaska App. 2001), *Wardlow v. State*, 2 P.3d 1238 (Alaska App. 2000), and *Allen v. State*, 945 P.2d 1233 (Alaska App. 1997). The state argues that evidence of prior conduct can have significant probative value, and will not undermine the presumption of innocence or dilute the prosecution's burden of proof. *Bingaman v. State*, A-8209.

Custodial interference and the defense of necessity. The state argues that a defendant should not be able to present an incomplete necessity defense in a trial for first-degree custodial interference by relying on some ambiguous dicta in footnote three in *Gerlach v. State*, 699 P.2d 358 (Alaska App. 1985). In *Gerlach*, the court of appeals held that a necessity defense was unavailable to a defendant accused of custodial interference who had not availed herself of a judicial remedy before absconding with her child and remaining out of the state for over a year. *Harwood v. State*, A-8183.

Review of two sentences imposed in separate cases consecutive to each other. The state argues that a defendant's composite sentence of five years to serve for felony DUI

and felony refusal in Kenai was not excessive. The state argues that the sentencing court properly considered that the defendant had committed another felony DUI and felony refusal in Anchorage while on bail release pending trial in the Kenai case, for which he subsequently received a composite sentence of 11½ years to serve. Nevertheless, the state maintains that the court of appeals should not review the aggregate sentence in both cases (16½ years) because the offenses were totally unrelated and imposed by different judges. *Baker v. State*, A-8269.

Hearsay testimony – right to confrontation. The state argues that a defendant's right to confrontation is satisfied when he has the opportunity to cross-examine a hearsay declarant even though the declarant has no recollection of the substance of the hearsay statement. The defendant sexually abused the victim-declarant when she was very young. At trial, the state introduced the victim's hearsay statements. The victim also appeared as a witness but remembered nothing about the abuse. *Vaska v. State*, A-8232.

Revocation of probation – self-incrimination privilege. The state argues that a trial judge properly found that the defendant was not amenable to sex offender treatment and revoked his probation on the basis of the defendant's repeated denials of guilt concerning both his current offense and his prior offenses, and the high likelihood that he would persist in his denials irrespective of the outcome of a pending appeal from the denial of his application for post-conviction relief. The state explains that once a defendant's conviction becomes final, *i.e.*, once his direct appeal is completed, the defendant's privilege against self-incrimination ordinarily is extinguished. The state then argues that, in the absence of a specific showing that the collateral attack is likely to be successful, a defendant does not have a privilege against self-incrimination with respect to either his prior offenses or current offenses during the pendency of a post-conviction relief proceeding

or an appeal of that proceeding. *James v. State*, A-8109.

Court Decisions of Note - Alaska

Statute and Rule Interpretations

Appellate Rule 214(d) prohibiting citation of unpublished opinions. In response to the state's petition for rehearing, the Alaska Court of Appeals reaffirmed its earlier holding that Appellate Rule 214(d) – which states that unpublished memorandum opinions may not be cited in the courts of Alaska – does not preclude citing memorandum opinions for informational purposes in the trial courts. The state has petitioned for hearing from this holding so that the Alaska Supreme Court may decide the meaning of its own rule. *McCoy v. State*, Op. No. 1842 (Alaska App., November 22, 2002).

Accomplice-liability statute – proof requirements. The court of appeals interpreted AS 11.16.110(2), the accomplice-liability statute, to require proof only that the accomplice acted with an intent to promote or facilitate the conduct of the principal, and overruled as wrong the interpretation it had given the statute in *Echols v. State*, 818 P.2d 691 (Alaska App. 1991) (requiring proof that the accomplice intended the result of the principal's conduct, as well). *Riley v. State*, Op. No. 1847 (Alaska App., December 27, 2002).

Robbery statutes – use of force. The Alaska Court of Appeals interpreted the applicable robbery statutes to include situations not only where the defendant uses force upon a person possessing property to compel that person to surrender the property, but also where a defendant uses force upon a person related to the person possessing the property to compel the latter person to

surrender the property. *Cathey v. State*, Op. No. 1845 (Alaska App., December 13, 2002).

Alaska Criminal Rule 25(d)(2) – exercising a peremptory challenge of a judge. The court of appeals interpreted Alaska Criminal Rule 25(d)(2) as preserving a peremptory challenge to a judge within five days of notice that the judge is assigned to the case in superior court, even if the same judge during preliminary proceedings in district court has given notice that he will be the superior court judge assigned to the case. *Watt v. State*, Op. No. 1948 (Alaska App., January 3, 2003).